PP

v.

MOHAMMAD TERANG AMIT

HIGH COURT SABAH AND SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CRIMINAL APPEAL NO: 41-05-98-11 (SG)]
28 NOVEMBER 1998

EVIDENCE: *Corroboration - Child complainant - Outraging modesty - Unsworn evidence of children complainants - Whether capable of corroborating each other - Statement made by child to third party - Whether admissible - Whether made at the first reasonable opportunity - Whether third party's evidence capable of corroborating child's evidence - Evidence Act 1950, ss. 8(2), 157*

EVIDENCE: *Documentary evidence - First information report - First information report made by child complainant - Admissibility - Delay in lodging report - Whether court entitled to infer that report was substantially untrue - Criminal Procedure Code, s. 108A*

EVIDENCE: *Expert evidence - Medical report - Outraging modesty - Whether expert must show that he has given evidence in court before - Physical examination of complainant - Findings of examination rejected by trial magistrate - Whether unjustified - Whether medical report ought to be admitted*

The respondent, a school teacher, was charged with offences under s. 354 Penal Code for using criminal force to outrage the modesty of three female students ('PW7, PW8, PW9'). Both PW7 and PW8 at the material time were 12 years old while PW9 was 10 years old. In the court below, evidence was adduced by PW7 *inter alia* that the respondent, during the material period, had repeatedly intruded into the girls' hostel at night, and on each occasion had touched her breast and inserted his finger into her private part. PW8 and PW9, likewise, had given evidence to the same effect. Evidence was also led which showed that the girls had informed their parents of the alleged incident, but only did so months thereafter.

Having heard the prosecution, the learned magistrate ruled that the respondent had no case to answer and so acquitted and discharged the respondent of all the charges. According to the learned magistrate, the respondent's defence

could not be called as: (1) the unsworn evidence of PW7, PW8 and PW9 could not corroborate one another; (2) the unsworn evidence of PW13 and PW14, another two female students, were incapable of corroborating the evidence of PW7, PW8 and PW9; (3) the evidence of PW10, PW11 and PW12, the respective parents of PW7, PW8 and PW9, and of PW 15, a teacher at the school, could not corroborate the evidence of PW7, PW8 and PW9, as the former were only relating events as told them by the latter (4) the medical reports of PW7, PW8 and PW9 were not admissible as the doctors, in tendering the reports, had not complied with the procedure suggested in *Wong Chop Saow v. PP*; and (5) the police reports were not lodged "at the first reasonable opportunity" thereby entitling the court to infer that the allegations therein were baseless or substantively untrue.

Dissatisfied, the Public Prosecutor appealed. Before the learned judge, the primary issues that arose were (1) whether the learned magistrate was right in holding that there was no corroboration in respect of the evidence of PW7, PW8 and PW9 (2) whether the evidence of PW10, PW11, PW12 and PW15 could be treated as corroborative evidence (3) whether the evidence of PW10 and PW 11 in any case could be admitted under s. 157 of the Evidence Act 1950 ('the Act').

Held:

[1] It is not only a prudent practice but also a statutory requirement in the form of s. 133A of the Act that in order to support the case of the prosecution against an accused person, the unsworn evidence of a child must be corroborated by some other material evidence.

[2] The case of *The King v. Job Whitehead* could not be said to represent the correct statement of the law applicable in our country. The learned magistrate had therefore misdirected himself when he rejected outright the evidence of PW10, PW11, PW12 and PW15 by merely relying on the authority of this case.

[3] The expression "at or about the time the fact took place" in s. 157 of the Act is limited not in terms of hours or days, but by the terms "first reasonable opportunity" or "as speedily as could reasonably be expected". In this case, in view of the conspicuous delay by PW7 and PW8 to inform their mothers of the alleged incident, they had not therefore informed the latter at the "first reasonable opportunity" or "as speedily as could reasonably be expected" of them. The mothers' evidence, hence, could not corroborate the evidence of PW7 and PW8.

[3a] The evidence of PW15, however, suffered from no infirmity. Bearing in mind that the alleged incidents in two of the charges herein were said to have occurred between the month of January and November 1997, it is clear that whatever complaints lodged by PW7 and another female student with PW15, being made as they were in October 1997, were made as speedily as could reasonably be expected of them under the circumstances. PW15's evidence, therefore, could corroborate the evidence of PW7.

[3b] The complaint lodged by PW7 with PW15 was also relevant by virtue of s. 8(2), explanations 1 and 2, and illustrations (j) and (k) of the Act. From the said illustrations (j) and (k), either way, the evidence of PW15, taken on its own, might be considered as a piece of substantive evidence or be treated as corroborative evidence under the said s. 157.

[4] The suggestion in *Wong Chop Saow v. PP* are too inhibitive as to exclude the evidence even of an eminent expert if he has not given any evidence in court before. On the other hand, the Supreme Court in *Junaidi bin Abdullah v. Public Prosecutor* has laid down a more equitable approach by ruling that, except in cases where the evidence is of a complex and scientific nature, lack of qualification or experience on the part of the expert will only affect the weight of evidence and not admissibility, and further that, there is no hard and fast rule on the issue of the competency of an expert witness.

[4a] Since the evidence sought to be adduced by the prosecution through the three doctors ('PW1, PW2, PW3') concerned the physical examinations of PW7, PW8 and PW9 and their respective private parts, there was no reason whatsoever to reject their findings on such a simple matter. More so when they conducted the examinations in the presence of PW4 who was a specialist and Head of the Obstetrics and Gynaecology Department, Sarawak General Hospital. The learned magistrate was clearly wrong when he failed to consider the evidence of PW1, PW2, PW3 and PW4 together with the medical reports P1, P2 and P3.

[4b] The aforesaid notwithstanding, on the facts, the only piece of evidence which may assist the prosecution is P1 which revealed that the hymen of PW7 was torn. Obviously, the medical report of PW7 should be capable of corroborating the evidence of PW7 that "there were many occasions where the respondent entered the hostel where she was staying at night at about 11 p.m. and on each occasion the respondent would touch her breast and insert his finger into her private part".

[5] The learned magistrate, in ruling that PW7, PW8 and PW9 had not lodged their complaints at the first reasonable opportunity, had failed to consider that the complainants were all school children who resided at the hostel of the school they were studying. In view of their tender age, the learned magistrate ought to have considered whether they in reality would have had the opportunity or access to lodge a police report, and more importantly, whether they possessed the idea and knew how to lodge a police report.

[5a] In any case, the police reports lodged by PW7, PW8 and PW9 could be admitted by virtue of s. 108A of the Criminal Procedure Code. The police reports P6, P7 and P8 should have been admitted by the learned magistrate under this section.

[6] On the evidence, a *prima facie* case has been made out against the respondent only in respect of the third charge. Upon a maximum evaluation of the evidence adduced, it is clear that the evidence of PW7, the alleged victim of the third charge, was amply corroborated by the evidence of PW15, as well as by P1 and P6. The respondent ought to have been called to enter his defence in respect of this charge.

[Respondent to enter defence on third charge. Order of acquittal in respect of first and second charges affirmed.]

Cases referred to:
Director of Public Prosecutions v. Hester [1972] 3 All ER 1056 ***(refd)***
Junaidi bin Abdullah v. Public Prosecutor [1993] 4 CLJ 201 ***(refd)***
Lim Baba v. Public Prosecutor [1962] 28 MLJ 201 ***(refd)***
Lt Kol Yusof Bin Abdul Rahman v. Kol Anuar bin Mat Amin [1997] 1 MLJ 562 ***(refd)***
Pendakwa Raya v. Ismail bin Atan [1992] 2 CLJ 1253 ***(refd)***
Public Prosecutor v. Ong Cheng Heong [1998] CLJ JT (11) ***(refd)***
Public Prosecutor v. Teo Eng Chan & Ors [1988] 1 CLJ 425 ***(foll)***
R. v. Cummings [1948] 1 All ER 551 ***(refd)***
Tan Cheng Kooi & Anor v. Public Prosecutor [1972] 2 MLJ 115 ***(refd)***
Syed Abu Tahir a/l Mohamed Esmail v. Public Prosecutor [1988] 3 MLJ 485 ***(foll)***
The King v. Job Whitehead [1929] 1 KB 99 ***(refd)***
Wong Chop Saow v. Public Prosecutor [1965] 31 MLJ 247 ***(refd)***

Legislation referred to:
Criminal Procedure (Amendment) Act 1997, ss. 4, 6
Criminal Procedure Code, ss. 108A, 180, 182A
Evidence Act 1950, ss. 8(2), (k), 45, 133A, 157

a Penal Code, s. 354
Children and Young Persons Act 1933 [Eng], s. 38
Evidence Act [Sing], s. 159

Reported by WA Sharif

b

JUDGMENT

Muhammad Kamil Awang J:

c The respondent, Mohammad Terang B Amit was charged with three counts of using criminal force to outrage the modesty of PW7, PW8 and PW9 contrary to s. 354 of the Penal Code.

The three charges were tried jointly at the same trial and at the end of the case for the prosecution, the learned magistrate discharged and acquitted the *d* respondent of all the said charges.

Being dissatisfied with the decision of the learned magistrate, the Public Prosecutor appealed to the High Court citing three grounds in support thereto.

e

In the first ground of the appeal, it was alleged that the learned magistrate erred in holding that there was no corroboration in respect of the evidence of PW7, PW8 and PW9. The other two grounds which concerned the admissibility of the medical and police reports have relation with the issue of corroboration and therefore are pertinent to the first ground of appeal as well.

f

Briefly, the respondent was a teacher at the school attended by PW7, PW8 and PW9. At the time of the alleged commission of the offences, PW9 was only ten years old and PW8 and PW7 were both twelve years old. All the alleged incidents were said to have happened at about 11.00 pm inside the *g* hostel known as Asrama Puteri, where the three girls were putting up together with some of the female students from the school.

Coming back to the first ground of the appeal herein, it was decided by the learned magistrate that the unsworn evidence or the evidence given not under *h* oath by PW7, PW8 and PW9 at the trial could not be relied upon to corroborate each other. In addition thereto, the learned magistrate also held that the evidence of another two students, PW13 and PW14, given also not under oath could not be used to support the evidence of PW7, PW8 and PW9.

i

It is not only a prudent practice but also a statutory requirement in the form of s. 133A of the Evidence Act that in order to support the case of the prosecution against the accused person, the unsworn evidence of a child must be corroborated by some other material evidence. Section 133A of the Evidence Act provides that:

> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section.
>
> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

It is pertinent to note that the provisions of s. 133A of the Evidence Act are in fact derived from s. 38 of the Children and Young Persons Act 1933 of England. In this regard, the learned magistrate clearly demonstrated the correct application of the law in citing *Director of Public Prosecutions v. Hester* [1972] 3 All ER 1056, where Lord Pearson after having recited the relevant part of s. 38 of the Children and Young Persons Act 1933 went on to state that:

> The proviso contains the only statutory disqualification of unsworn evidence differentiating its effect from that of other evidence. An accused person is not to be convicted on unsworn evidence unless it is corroborated by some other material evidence in support thereof implicating the accused. The disqualification applies to all the unsworn evidence given in a particular case; if there are two or more children giving unsworn evidence to the same effect, still there can be no conviction unless there is some other evidence corroborating their evidence.

The abovesaid explanation inexplicably affirmed the findings of the learned magistrate that the unsworn evidence of PW7, PW8 and PW9, taken individually, could not be used to corroborate the unsworn evidence of the

other two witnesses. The unsworn evidence of another two female students, PW13 and PW14, could not be relied upon as well to corroborate the evidence of either PW7, PW8 and PW9.

In dealing with the evidence of PW10, PW11 and PW12, all of whom are parents of PW7, PW8 and PW9, the learned magistrate was of the view that their evidence could not be used to corroborate the evidence of PW7, PW8 and PW9 as the events as related by PW10, PW11 and PW12, in particular PW10 and PW11 at the trial were told to them by their respective daughter. On similar ground, the learned magistrate also did not accept the evidence of PW15, another teacher at the same school, as being capable of corroborating the evidence of PW7, PW8, and PW9. In support thereto, the learned magistrate referred to the case of *The King v. Job Whitehead* [1929] 1 KB 99, where Lord Hewart CJ in delivering the judgment of the Court of Criminal Appeal held that:

> Any such inference as to what the girl had told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself, if was merely the girl's story at second hand. In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated.

However, in the case of *Lim Baba v. Public Prosecutor* [1962] 28 MLJ 201, where the above case of *The King v. Job Whitehead (supra)* was discussed, His Lordship Ismail Khan J (as he then was) said:

> It was also contended that the learned President had misdirected himself in accepting as corroboration the complaint by P.W.3 shortly after the alleged occurrence of the facts complained of. I fail to see any misdirection having regard to section 157 of our Evidence Ordinance 1950 which reads:
>
> > In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.
>
> It is true in an English case *Rex v. Job Whitehead (ibid)*, it was held that a witness cannot corroborate himself. The question of the admissibility of such an immediate complaint was dealt with in the case of *Rex v. Velayuthan* [1935] MLJ 277, a Singapore case. In that case Whitley J. referred to section 157 of the Ordinance No. 53 (Evidence) (now section 158 of Cap 13 S.S) which is

> identical with section 157 of our Evidence Ordinance. He said that this section has no counterpart in the English law of evidence and therefore a complaint if made immediately would be treated as corroboration, although in England it would not be so regarded. Its value and strength as corroboration must depend in every case upon the circumstances under which it is made.

Having regards to the abovesaid principles as enunciated by the learned judge therein, it is abundantly clear that the *Whitehead's* case could not be said to represent the correct statement of the law applicable in our country. As such, the learned magistrate must have misdirected himself when he rejected outright the evidence of PW10, PW11, PW12 and PW15 by merely relying on the authority of that case. Be that as it may, it still prevails upon this court to scrutinise the evidence of PW10, PW11, PW12 and PW15 in order to determine whether their evidence can be treated as corroborative evidence.

In her evidence, PW10, who is the mother of PW8, informed the court that her daughter told her sometime in the month of February 1998, that the respondent touched her breast and also kissed and touched her private part. PW11, the mother of PW7 testified that her daughter informed her four days before Hari Raya Puasa this year that the respondent opened PW7's trousers while she was sleeping and used his finger to insert into her vagina. As for PW12, who is the father of PW9, he merely testified that he accompanied his daughter to lodge a police report at the Sri Aman Police Station.

Thus, the crucial question to be considered is whether the evidence of PW10 and PW11, in particular, can be admitted by virtue of s. 157 of the Evidence Act 1950. In a Singapore's case of *Public Prosecutor v. Teo Eng Chan & Ors* [1988] 1 MLJ 156, the words "at or about the time the fact took place" in s. 159 of the Evidence Act of Singapore which is similar to s. 157 of our Evidence Act was discussed and Coomaraswamy J held that:

> Our law is contained in section 159 of the Evidence Act which provides that a witness' testimony may be corroborated by any former statement made by such witness "... relating to the same fact at or about the time the fact took place or before any legal authority competent to investigate the fact". The expression "at or about the time the fact took place" is not to be limited in terms of hours or days. It is limited by the terms "first reasonable opportunity" or "as speedily as could reasonably be expected".
>
> Further, section 159 must be read with section 8(2), Explanation 1 and Illustrations (j) and (k) to that section.

In view of the abovesaid explanations and the conspicuous delay by PW7 and PW8 to inform their mothers of the alleged incidents, it could not be gainsaid that they had upon the "first reasonable opportunity" or "as speedily as could reasonably be expected" of them informed their mothers. Their evidence, therefore, must be precluded as capable of corroborating the evidence of PW7 and PW8.

On the other hand, the evidence of PW15 suffered from no such infirmity. According to PW15, he was informed by PW7 and another female student in October 1997 that the respondent had disturbed them while they were sleeping. It was revealed that the respondent opened their trousers and inserted his finger into their private parts and also fondled their breasts. It must be remembered that in two of the charges herein, the alleged incidents were said to have occurred between the month of January and November 1997. Furthermore, PW15 was only transferred to the said school in August 1997. From the evidence adduced, it is clear that whatever complaints lodged by PW7 and another female student with PW15 were made as speedily as could reasonably be expected of them under the circumstances of the case.

In any event, the complaint lodged by PW7 with PW15 is also relevant by virtue of s. 8(2), explanations 1 and 2, and illustrations (j) and (k) of the Evidence Act 1950 as remarked in the case of *Public Prosecutor v. Teo Eng Chan & Ors (supra)*. The relevant parts of s. 8 together with the explanations and illustrations are as follows:

> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> Explanation 1 - The word "conduct" in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
>
> Explanation 2 - When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

ILLUSTRATIONS

(j) The question is whether A was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that without making a complaint she said that she had been ravished is not relevant as conduct under this section, though it may be relevant –

(i) as dying declaration under section 32(a): or

(ii) as corroborative evidence under section 157.

(k) The question whether A was robbed.

The fact that soon after the alleged robbery he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that he said that he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant –

(i) as a dying declaration under section 32(a); or

(ii) as corroborative evidence under section 157.

From the above two illustrations, either way, the evidence of PW15 taken on its own may be considered as a piece of substantive evidence or be treated as corroborative evidence under s. 157.

As for the second ground of this appeal concerning the admissibility of the three medical reports of PW7, PW8 and PW9, the learned magistrate ruled that they were not admissible since the suggestions by Hashim J as to how expert witness should give his evidence in the case of *Wong Chop Saow v. Public Prosecutor* [1965] 31 MLJ 247 had not been strictly complied with in our instant case. His Lordship in that case suggested that:

May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts. He should then

> proceed to describe the various documents and give his reasons why in his opinion they relate to characters lottery. The trial magistrate must then come to a finding that he either accepts or rejects the evidence of the expert witness *vis-a-vis* characters lottery.

It must be pointed out that the abovesaid suggestions, if they are to be followed strictly, are too inhibitive as to exclude the evidence of even an eminent expert if he has not given any evidence in court before. The Supreme Court in the case of *Junaidi bin Abdullah v. Public Prosecutor* [1993] 4 CLJ 201; [1993] 3 MLJ 217 laid down a much more comprehensive and equitable approach for the reception of expert opinions under s. 45 of the Evidence Act 1950. In delivering the judgment of the Supreme Court, His Lordship Mohamed Azmi SCJ held that:

> In our view, the test to be applied for the purpose of s. 45 of the Evidence Act 1950 is this. First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The speciality of the skill required of an expert witness under s. 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the court be required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or the lack of it) of the expert. To use the words of Suffian LP at p. 323 in *Muhamed bin Sulaiman* [1982] 2 MLJ 320 when he applied the case of *PP v. Virammal* AIR 1923 Mad 178, the jurors themselves, 'could have used a magnifying glass, or their own eyes and their own mind to the evidence and [verify] the results submitted to them by the expert witness. *The lack of qualification or experience on the part of the expert must necessarily affect the weight of the evidence rather than admissibility. But where the evidence is of a complex and scientific nature, the absence of both qualification or experience can certainly affect admissibility. No hard and fast rule should be laid down on the issue of the competency of an expert witness.* (Emphasis supplied)

Since the evidence sought to be adduced by the prosecution through the three doctors, PW1, PW2 and PW3 concerned the physical examinations of PW7, PW8 and PW9 and their respective private parts, there is no reason whatsoever to reject their findings on such a simple and straightforward matter. It must be remembered that all the examinations were conducted in the presence of

PW4. PW4 graduated as a medical doctor in 1985. He was a specialist and Head of the Obstetrics and Gynaecology Department, Sarawak General Hospital at the time when PW7, PW8 and PW9 were examined by PW1, PW2 and PW3. In the course of the examinations, it was found that only the hymen of PW7 was torn. Apart from this, there was no evidence of other physical injuries on either PW7, PW8 or PW9. In the result, the learned magistrate was clearly wrong when he failed to consider the evidence of PW1, PW2, PW3 and PW4 together with the medical reports P1, P2 and P3. Nevertheless, the only piece of evidence which may assist the prosecution is P1, the medical report of PW7, which revealed that the hymen of PW7 was torn at one o'clock, six o'clock and eleven o'clock positions. In *Syed Abu Tahir a/l Mohamed Esmail v. Public Prosecutor* [1988] 3 MLJ 485 Zakaria Yatim J (as he then was) after having considered the evidence of the doctors who examined the complainant and the accused in a kidnapping cum rape case held at p. 488:

> In my opinion the evidence of the girl was sufficiently corroborated by the two doctors who examined the girl and the appellant respectively. In a case of this nature, medical evidence is sufficient to corroborate the evidence of the girl: see Ratanlal & Dhirajjlal, *The Law of Crimes*, 22nd Ed, p. 965.

According to the evidence of PW7, there were many occasions where the respondent entered the hostel where she was staying at night at about 11.00 p.m. On each occasion, the respondent would touch her breast and insert his finger into her private part. Evidently, the medical report of PW7 should be capable of corroborating the evidence of PW7.

Finally on the issue of the police reports lodged by PW7, PW8 and PW9, the learned magistrate noted that he was entitled and even encouraged to infer that the complainants' allegations against the accused was either totally or substantially untrue "by virtue of the facts that the complaints were not lodged at the first reasonable opportunity." The complaint made at the first reasonable opportunity depends on the circumstances in each case. In *R v. Cummings* [1948] 1 All ER 551 (CA), Lord Goddard CJ said:

> It is objected that she did not make a complaint immediately, and therefore, that evidence of the fact that she made a complaint ought not to have been admitted. The law on the subject was laid down once and for all in *R v. Lillyman* [1896] 2 QB 167 which reviewed all the authorities. Hawkin J in delivering the judgment of the Court of Crown Cases Reserved, in that case, said:

> It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected.

However, the learned magistrate failed to consider that the complainants were all school children who resided at the hostel of the school they were studying. PW7 was 12 years old at the time of the incident and so was PW8. PW9 was even younger then, she was only ten years old. In reality, would they have the opportunity or access to lodge the police reports? More importantly did they possess the idea and know how to lodge a police report in view of their tender age? These are factors which the learned magistrate should have considered before rejecting the admissibility of the police reports. In addition, the police reports lodged by PW7, PW8 and PW9 can be admitted by virtue of s. 108A of the Criminal Procedure Code which provides that:

> 108A. In any proceeding under this Code a copy of an entry relating to an information reduced to writing under the provisions of section 107 or of section 108, and purporting to be certified to be true copy by the Officer in Charge of the Police District in which the police station where the information given is situated, shall be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded.

Such a report which generally have been accepted and known as a first information report can never be considered as a piece of substantive evidence to prove a fact. At the most, it is only of corroborative value (see: *Tan Cheng Kooi & Anor v. Public Prosecutor* [1972] 2 MLJ 115. In *Pendakwa Raya v. Ismail bin Atan* [1992] 2 CLJ 1253, James Foong Cheng Yuen JC (as he then was) held that:

> In this case, the first information report was the information PW3 received from his source. If this report is tendered it can be **admitted** under s. 108A of the Criminal Procedure Code. In fact, if the information is reduced to writing, it will be of considerable value to this trial since its material can be compared with subsequent materials derived from such investigation. This would enable the court to evaluate these evidence in order to come to a just decision.

Indeed, the police reports P6, P7 and P8 should have been admitted by the learned magistrate under s. 108A of the Criminal Procedure Code. Nevertheless, it must be emphasised that the evidence so admitted are not meant to show the truth of the allegations as contained therein but to underline the consistency of the stories.

Upon the foregoing reasons and upon a careful scrutiny of the evidence deemed admissible, this court is of the view that a *prima facie* case has been made out against the respondent only in respect of the third charge. In the final analysis and upon a maximum evaluation of all the evidence adduced herein, it is clear that the evidence of PW7, the alleged victim in the third charge was amply corroborated by the evidence of PW15, P1 and P6 as well.

In the result, this case is hereby ordered to be remitted to the magistrate court at Sri Aman for the learned magistrate to call upon the respondent to enter his defence on the third charge herein. The order of discharge and acquittal of the respondent in respect of the first and second charge is hereby confirmed.

Though it is not a ground of appeal, I should mention here, in order to avoid any misunderstanding, that the degree of proof required of the prosecution's case at the close of the case for the prosecution is a *prima facie* proof. The learned counsel for the respondent, Mr John Shek, submitted that the degree of proof required to establish (at the end of the prosecution's case) a *prima facie* case is beyond reasonable doubt. The quotation is gleaned from the headnote Held (3) in the Court of Appeal case of *LT Kol Yusof Bin Abdul Rahman v. Kol Anuar bin Mat Amin* [1997] 1 MLJ 562. But it is clear that this case is a decision made prior to the Amendment Act A979, ie, before the Amendment Act A979 was gazetted. This quotation is not *ratio decidendi* of the case; apparently, it is a mere *obiter dictum*.

The new ss. 180 and 182A in Act A979 are for convenience reproduced as follows:

Section 180:

(i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(ii) If the Court finds that prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(iii) If the Court finds a *prima facie* case has been made out against the accused on the defence charged the Court shall call upon the accused to enter on his defence.

Section 182(A):

> (i) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution had proved its case beyond reasonable doubt.
>
> (ii) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted thereon.
>
> (iii) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

It is noted that s. 180 of the Act deals with the degree of proof required at the end of the case for the prosecution. Section 182(A) of the Act is quite different, it deals with the degree of proof required at the conclusion of the trial. It follows, obviously, that there are two degrees of proof at two different stages, ie, a *prima facie* proof and a proof beyond reasonable doubt. The two cannot be the same.

The proof of a *prima facie* under s. 180 of the Act, is succinctly explained in *Public Prosecutor v. Ong Cheng Heong* [1998] CLJ JT (11) by Vincent Ng J at p. 16 that:

> *Prima facie* means on the face of it or at first glance. To me, in the light of the Amendment Act 1979 ... the definition of *a prima facie* could be found in the Oxford Companion of Law (page 987), which has it as: "As case which is sufficient to call for an answer." While *prime facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive.

As to the "*prima facie* case" as enunciated in the *Lt Kol Yusof bin Abdul Rahman's* case *(supra)*, the learned judge has this to say (at p. 15) *(ibid)*

> ... I found myself unable to agree with its rationale for deciding that the degree of proof to establish a *prima facie* case is proof beyond all reasonable doubt. ... I also find that it is an authoritative judicial precedent which is binding and must be followed under the principle of *stare decisis* as the dicta therein or what constitutes *prima facie* as an *obiter dictum* rather than *ratio decidendi.*

I can do no better than what has been said by the learned judge, and I would not hestitate to express my concurrence thereto.